Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

THOMAS TOCCO,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's right to a public trial and due process was denied when the trial judge, *prior* to making a finding that the prosecution had advanced an overriding interest likely to be prejudiced if the courtroom were not closed during the testimony of an undercover officer, elicited from defense counsel his purported consent to erecting a screen across the courtroom, *then* found an overriding interest in closure?

2. When, without offering any explanation to the jury, the trial judge permitted certain persons—including Petitioner's wife and the press—to sit in front of a screen erected across the courtroom during an undercover officer's testimony, but did not permit others—including Petitioner's parents, relatives and friends—whether the perception that those excluded are dangerous was so prejudicial as to deny Petitioner due process and a fair trial?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the People of the State of New York against Thomas Tocco.

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STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, in this case.

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department, ("Appellate Division") affirmed the judgment of conviction of the Supreme Court, Bronx County, in an opinion reported at *People v. Tocco*, __ A.D.2d __, 685 N.Y.S.2d 699 (1st Dept. 1999), and reprinted in the appendix at App. 3a. A post-judgment opinion of the Supreme Court, Bronx County, which is unreported, is reprinted in the appendix at App. 6a.

JURISDICTION

The judgment of the Appellate Division was entered on February 23, 1999, and Petitioner's application for leave to appeal to the New York Court of Appeals was denied on June 24, 1999. App. 1a. This petition for a writ of certiorari is filed within ninety days of the order denying the application for leave to appeal, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Unites States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

Unites States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

STATEMENT OF THE CASE

1. Following a jury trial, Petitioner was found guilty of criminal possession and sale of a controlled substance and was sentenced to an aggregate term of imprisonment of 44 years to life. Only two witnesses testified on the prosecution's direct case: a police department chemist and the undercover officer ("undercover") with whom Petitioner conducted the two drug transactions that form the basis of his conviction.

2. Prior to Petitioner's trial, the prosecutor made an application to close the courtroom during the testimony of the

undercover and to have him testify anonymously. (AD App. 252)[1] The court conducted a closure hearing at which the undercover testified in a courtroom closed to the public but open to the press.

3. The undercover testified at the hearing that he was still operating in an undercover capacity and was concerned about his safety. He did not specify where he was currently working, although it was not in Bronx County—where the drug transactions and the trial took place—and he acknowledged that neither Petitioner not anyone associated with him had ever threatened him. (AD App. 434-35, 439) He had testified twelve times over nine years as an undercover, and his identity had been withheld in every instance because of his concerns for safety. (AD App. 320-24) He was concerned in this particular case because he believed Petitioner was associated with members of organized crime—the undercover suggested that Petitioner's father, a municipal employee with no criminal record, and someone the undercover thought to be Petitioner's cousin had connections to organized crime—but he offered no evidence that Petitioner himself was a member of organized crime or a threat to the undercover's safety, nor was there any indication that the "cousin" had ever committed a crime or would even be attending the trial. (AD App. 434-39)

4. The undercover also testified at the hearing about extraneous events that purportedly caused him to be concerned for his safety. A witness in a federal arson case—Petitioner as well as others were alleged to have been involved in the arson—had been firebombed, albeit when Petitioner was in jail. (AD App. 308, 474-75) One of the others accused of that arson had said that if he found out someone was an undercover, he would blow up his house. (AD App. 307) More than a year *after* Petitioner's arrest, while he was in jail, two phone calls were made to the undercover's home in which a woman

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[1] Refers to pages of the appendix in the Appellate Division.

with a Spanish accent and a man who sounded like a "knocked around guy" asked for "Vinny," an undercover name he had used in this case but in at least two other cases as well. (AD App. 388-94, 403, 417-20) Also, Petitioner had commented to the undercover that "they" had killed a confidential informant; the undercover conceded, however, that Petitioner had not said "we" did so, and the undercover's report reflected that Petitioner had said the confidential informant "OD'd." (AD App. 304, 441-53, 461-64) On the other hand, the undercover testified that his undercover status had *already* been compromised during the investigation because a rogue detective told Petitioner and others that he was an undercover. (AD App. 425-28, 468-70)

5. Subsequent to the hearing testimony, the prosecutor and an attorney representing the police department argued for closure—with the police department attorney suggesting that the undercover could testify behind a screen, but noting that this "would perhaps be more prejudicial to the defendant than complete closure" (H 322)[2]—and defense counsel argued against closure. Immediately after the arguments concluded, the court addressed defense counsel as follows:

> THE COURT: What's your position to a partial closure and use of the screen?
>
> [DEFENSE COUNSEL]: I oppose. I oppose the use of the screen because I don't think the first prong under *Ayala*[3] has been satisfied.

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[2] Numbers preceded by "H" refer to pages of the hearing transcript. Numbers preceded by a date and "T" refer to pages of the trial transcript of that date.

[3] Presumably referring to *Ayala v. Speckard*, 89 F.3d 91 (2d Cir.), *modified on denial of rehearing*, 102 F.3d 649 (2d Cir. 1996). The "first prong" is that the party seeking closure "must advance an overriding interest that is likely to be prejudiced." *Ayala*, 102 F.3d at 651, *citing Waller v. Georgia*, 467 U.S. 39, 48 (1984). Subsequent to Petitioner's trial, *Ayala* was reheard in banc by the Second Circuit, which held that "persuasive evidence of serious risk to an important interest"

The People have not made out their compelling interest. They have not made out the necessary nexus between this undercover's concerns and the constitutional standard.

THE COURT: Well, without conceding that they have, *if it were my determination*, how would you feel to a partial closure, either a screen, mask/bag disguise, or anything else you might come up with?

[DEFENSE COUNSEL]: Well, if caught between the Scylla of closure and the Charybdis of obscuring his identity, I suppose one thing I think would be completely unacceptable would be anything that prevents the jury from seeing his demeanor on the witness stand. So a mask, a bag over his head, some sort of roving blue dot, that would be completely unacceptable.

I suppose in order to accommodate the jury's concerns as well as the press' concerns, you could erect a screen across the well area of the court . . . and the rest of the public would be treated to an unseemly specter of literally having half the courtroom cut off. They can hear the witness, but they can't see him.

I think that—I don't think that would be—withdrawn. I'll stop there.

THE COURT: Do you have any other thoughts on partial closure?

[DEFENSE COUNSEL]: No, I don't. I have given the matter some thought, and outside of an even more rigorous objection, anything preventing his face from being seen by the jury.

In fact, in terms of the case law when they talk about partial closure, although it's not clear because I don't

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is required for closure. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (in banc).

think it has arisen, but I don't think that even the cases that permit full closure contemplate the features of the witness being obscured from the jury.

And when [the attorney for the police department] calls for full closure, I'm not sure I know what that means. I was assuming that means that the actual participants in the trial get to see the undercover, but maybe it doesn't. Maybe she wants him concealed from the jury as well.

THE COURT: Anything else?

[DEFENSE COUNSEL]: That's all, Judge. Thank you. (H 346-48; emphasis added.)

6. The court rendered a decision on closure the following day, March 20, 1997.[4] Essentially for the reasons stated by the undercover, the court found that "the People have put forth an overriding reason for limiting defendant's right to a public trial," observing that "[a]n open courtroom creates the risk that an unscrupulous member of the courtroom may pass on the identity of the undercover officer to an individual who make [*sic*] seek to hurt him and his family." (H 480) Noting that the limitation is required to be no broader than necessary, the court addressed alternatives, then went on to misstate Petitioner's position as follows:

Defendant objected to the undercover testifying while wearing a and [*sic*], in any event, a disguise would limit the jury's ability to assess the demeanor of this witness.

Defendant did not object to the use of an opaque screen between the courtroom well and the spectators section, and the statement that if the Court was going to limit the

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[4] On July 1, 1997, three months after sentencing, the court issued a written decision retroactively elaborating upon and reinforcing its ruling. (App. 6a)

> defendant's right to a public trial, *that he would prefer this method.*
>
> Although this method maybe [*sic*] prejudicial to the defendant because it might imply to the jury that the defendant has dangerous friends this Court feels that this can be mitigated against by the use of an appropriate curative instruction. *As this is the defendant's preferred method of choice, I see no reason not to oblige him.* (H 480-81; emphasis added.)

The court added that the screen would be in place only during the testimony of the undercover, and that the press and defendant's wife could remain in front of the screen, visible to the undercover. (H 481-82) The court also ruled that the undercover could testify anonymously, using his shield number and his undercover name. (H 482)

7. Defense counsel promptly undertook to correct the court's misstatement:

> [DEFENSE COUNSEL]: Very briefly, Judge. I just want to be clear on the record that the screen is not my preferred method of choice, but between closure and the screen, I go with the screen. You were offering the choice by Scylla and Charybdis. I chose Scylla. It was not preferred. (H 482)[5]

The court did not respond to this correction.

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[5] At trial, when the screen was installed in the courtroom, defense counsel reiterated his objection:

> [DEFENSE COUNSEL]: Yes, Judge. The screen is now fully in place. I just wanted the record to be clear I object to the screen. I object to the closure.
>
> I accepted the screen as opposed to full closure, but that was without respect to my general objection to any closure whatsoever. (3/26/97 T 121-22)

Defense counsel arranged for photographs of the screen for the record on appeal. (3/26/97 T 119-22)

8. An opaque screen was erected behind the first row of spectator seats when the undercover anonymously testified at trial. The court "screened in" the defendant, his wife, defense counsel and the press, and "screened out" Petitioner's family and friends, including Petitioner's father, whom the undercover had claimed had organized crime connections, as well as Petitioner's father-in-law, brother-in-law, and mother, about whom no such claim was made. (AD App. 546-47, 620-29, 639-40, 670-71) The court later excluded a law student working for defense counsel's firm and for a federal judge. (AD App. 704-06) No explanation was provided by the court as to what determined who could remain in front of the screen and who must stay behind it.[6]

9. At trial, when the jury was confronted with the screen for the first time, the court instructed them simply as follows:

> You may notice that we have something added to the decor of the courtroom, not that it was a good-looking courtroom before nor is it today, but the screen is here because the undercover officer who will be testifying is still working in an undercover status and his identity is undercover. (3/26/97 T 127)

No explanation was given the jury as to why certain persons were permitted to remain in front of the screen and others not.

10. On appeal from the ensuing judgment of conviction, Petitioner maintained that his rights to an open and fair trial were violated by the employment of the screen. (Brief of Appellant-Defendant at 18-42) The Appellate Division affirmed. In the sole paragraph of its opinion relating to the courtroom closure issue, the court held that the trial court had "properly exercised its discretion in permitting the undercover to testify behind a screen," observing that the courtroom was not completely closed, that Petitioner and the jurors could

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[6] The defendant's wife had already met the undercover and was assisting the defense as a paralegal. She had been excluded from the closure hearing, however.

evaluate the witness's demeanor, and that the court's instruction "prevented the jury from drawing any adverse inference from the presence of the screen." (App. 4a-5a) The court added that the proof at the closure hearing would have supported full closure and also provided a basis for permitting the undercover to testify anonymously.

11. The New York Court of Appeals denied Petitioner's application for leave to appeal.

REASONS FOR GRANTING THE PETITION

I

A Defendant's Right to A Public Trial And Due Process Is Compromised When A Judge Elicits from Defense Counsel His Purported Consent to An Alternative to Full Courtroom Closure *Prior* to Making A Finding That The Prosecution Has Advanced An Overriding Interest Likely to Be Prejudiced If The Courtroom Were Not Closed.

1. The presumption of openness that underlies a criminal defendant's Sixth Amendment right to a public trial may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (*Press-Enterprise* standard applies to criminal defendant's Sixth Amendment right to public trial). In *Waller*, the Court configured the standard for courtroom closure into a four-factor test: the party seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the proceeding; and it must make findings adequate to support closure. *Waller v. Georgia*, 467 U.S. at 48.

2. Not only must the party seeking to close the proceeding—the prosecution in a criminal case—advance an overriding interest, it must do so with particularity. *See Brown v. Andrews*, 180 F.3d 403, 408 (2d Cir. 1999) ("[t]he State must demonstrate a specific connection between the perceived threat to the [undercover] officer and the officer's public testimony in the particular proceeding"). "The burden of particularity" is "a burden that clearly rests with the State," since "[t]he Public Trial Clause of the of the Sixth Amendment is an express constitutional right" and since "the Supreme Court in *Waller*, while permitting exceptions to public trials, leaves no doubt as to who must show that these exceptions apply." *Id.*

3. Since the prosecution bears the burden of proof with respect to the existence of an "overriding interest," it follows that a court must find that the prosecution has *met* this burden of proof before going on to decide whether the proven interest can be served by less than full closure. *Cf. Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (party opposing peremptory strike must demonstrate discriminatory motive; burden then shifts to proponent to offer race-neutral reason for strike; burden then shifts back to movant to show proffered reason pretextual); *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("Court of Appeals erred by combining *Batson*'s second and third steps into one").

4. The vice in considering alternatives *before* deciding whether the prosecution has met its burden of showing an "overriding interest" in closure is that it risks diluting that burden and predisposing a judge to "find" it satisfied *because* an alternative is available or acceptable. That vice is particularly likely to ripen where, as here, a judge not only considers alternatives first, but *elicits* defense counsel's position on alternatives before making a finding of overriding interest. Defense counsel is thereby thrust into a situation where he may be negotiating against himself, that is, acceding to alternatives when the judge has not found, and properly could not

find, that the prosecution has met its burden of proving an "overriding interest" in closure. Yet, counsel's acceding to an alternative makes it all but inevitable that the judge will then find the prosecution's burden met.

5. Here, there is little doubt that the court had not made its finding before eliciting defense counsel's position on alternatives. After defense counsel stated that "[t]he People have not made out their compelling interest [and] have not made out the necessary nexus between this undercover's concerns and the constitutional standard," the court expressly stated: "Well, *without conceding that they have, if it were my determination*, how would you feel to a partial closure, either a screen, mask/bag disguise, or anything else you might come up with?" (H 346; emphasis added.) Counsel's invocation of Scylla and Charybdis aptly points to the predicament which such a practice creates.

6. Of course, here the problem is much worse, because the court *misapprehended* defense counsel's position, inexplicably interpreting counsel's opposition to closure as consent to erecting a screen, and erroneously stating in its ruling that "[d]efendant did not object to the use of an opaque screen between the courtroom well and the spectators section" and "[a]s this is the defendant's preferred method of choice, I see no reason not to oblige him." (H 481) When defense counsel undertook to correct this misconception—"the screen is not my preferred method of choice, but between closure and the screen, I go with the screen"—the court did not respond, but it was too late in any event, because the court had by then made a finding of "overriding interest," undoubtedly influenced by defense counsel's supposed consent to the screen. Thus, the determination of "overriding interest" is undermined when, prior to determining it, the court is permitted to elicit positions on alternatives.

7. Courts have recently struggled with the question of who should propose alternatives to full closure: the court *sua*

sponte or the defendant.[7] *See Ayala v. Speckard*, 131 F.3d 62, 70-72 (2d Cir. 1997) (in banc); *id.* at 75-80 (Parker, J., dissenting); *People v. Ramos*, 90 N.Y.2d 490, 500-05, 739 N.Y.S. 739, 744-48 (1997).[8] Certiorari ought to be granted in this case to decide not only *who* should propose alternatives to full closure, but *when* such alternatives should be proposed.

II

Erecting A Screen across The Courtroom during An Undercover Officer's Testimony—A Practice That May Never Be Fair—Surely Denies A Defendant Due Process And A Fair Trial When, Without Any Explanation to The Jury, Some Persons Are Permitted to Sit in Front of The Screen, But Relatives And Friends of The Defendant Are Not, Thereby Suggesting They Are Dangerous.

1. "[P]lacing a screen between the witness and courtroom spectators . . . risks implying to the jury that the family or friends of the defendant in attendance are likely to be dangerous." *Ayala v. Speckard*, 131 F.3d at 71-72. Although some courts have found no abuse of discretion in employing such screens, *see United States v. Jones*, 965 F.2d 1507, 1513 (8th Cir. 1992); *United States v. Lucas*, 932 F.2d 1210, 1216-17 (8th Cir. 1990), it is difficult to imagine how the perception of dangerousness can ever be dispelled, considering that the

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[7] Here, an attorney for the police department suggested a screen.

[8] The great bulk of cases addressing courtroom closure are from New York courts or the United States Court of Appeals for the Second Circuit. This is undoubtedly because the widespread closure of courtrooms during the testimony of undercover police officers "is strictly a New York phenomenon." *Ayala v. Speckard*, 131 F.3d at 82 (dissent), *quoting* Robin Zeidel, Note, *Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & Pol'y 659, 663 (1996).

presence of a screen across the courtroom is so foreign to the mental picture of a trial that every American has and is so suggestive of menace. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1020-21 (1988) (use of screen between defendant and testifying child sexual assault victims violated Confrontation Clause).

2. In any event, even if there might be circumstances where the suggestion of danger from use of a screen could be neutralized by carefully crafted measures, that was surely not the case here, quite the contrary. The court's spare instruction to the jury regarding the screen—"the screen is here because the undercover officer who will be testifying is still working in an undercover status and his identity is undercover" (3/26/97 T 127)—hardly had the substance to ameliorate the risk. But more significantly, since the court permitted the press and Petitioner's wife inside the screen, while excluding Petitioner's parents, other relatives and friends, *without any explanation* for doing so, jurors were very likely to be skeptical about the court's instruction and were highly likely to surmise that the excluded family and friends of Petitioner were dangerous and posed a threat. *See In re Oliver*, 333 U.S. 257, 271-72 n.29 (1948) ("an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged"). That the undercover testified anonymously could only add to the specter of menace.

3. Certiorari ought therefore be granted in this case to determine whether the erection of a screen in ostensible service to a defendant's right to a public trial can ever be consistent with his right to a *fair* trial and, if so, to determine what precautions must be taken to insure that such a screen is employed in a fair manner that minimizes, not exacerbates, the prejudice to a defendant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 22, 1999

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

THOMAS TOCCO,

Appellant.

Before:

HON. CARMEN BEAUCHAMP CIPARICK,
Associate Judge

CERTIFICATE DENYING LEAVE

I, CARMEN BEAUCHAMP CIPARICK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

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* *Description of Order*: Order of the Appellate Division, First Judicial Department, entered February 23, 1999, affirming a judgment of the Supreme Court, Bronx County, rendered April 29, 1997.

Dated: June 24, 1999
at New York, New York

/s/ CARMEN BEAUCHAMP CIPARICK
Associate Judge

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ROSENBERGER, J.P., WILLIAMS, MAZZARELLI, SAXE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

THOMAS TOCCO,

Defendant-Appellant.

Judgment, Supreme Court, Bronx County (Richard Price, J.), rendered April 29, 1997, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree (2 counts), criminal possession of a controlled substance in the second degree (2 counts), and criminal possession of a controlled substance in the third degree (2 counts), and sentencing him to two consecutive terms of 22 years to life on the first-degree sale convictions, to run concurrently with two concurrent terms of 6 years to life on the second-degree possession convictions, and two concurrent terms of 6 to 18 years on the third-degree possession convictions, unanimously affirmed.

Although in requesting a charge on the defense of entrapment defendant argued that the police had induced him to make a sale of narcotics, defendant never asserted that the police engaged in egregious conduct or raised a specific claim that the alleged misconduct mandated dismissal of the indictment pursuant to *People v Isaacson* (44 NY2d 511). Thus, defendant's current claim in that regard is unpreserved for

appellate review (*People v Montgomery*, 88 NY2d 1041, 1043), and we decline to review it in the interest of justice. Were we to consider this claim, we would conclude that the police conduct was entirely proper and that none of the *Isaacson* criteria was met.

With respect to defendant's entrapment claim, we agree with the trial court that no reasonable view of the evidence supported an entrapment defense charge. Witnesses for both the People and the defense acknowledged that defendant was but one of many targets in a long-term undercover investigation designed to gather evidence about a corrupt police officer, an arson-homicide, and other homicides. Defendant was never targeted for the sale of cocaine to the undercover officer. To the contrary, the undercover officer was explicitly instructed to engage in drug purchases with anyone interested in selling. Thereafter, defendant twice willingly offered to sell cocaine to the undercover officer on his terms and at a price he set.

We reject defendant's argument that he was entitled to an entrapment charge simply because the People introduced evidence to rebut that defense. The People's right to introduce such evidence on their direct case was triggered by defendant's unequivocal declarations that he was relying on the entrapment defense (*see, People v Mann*, 31 NY2d 253, 260; *People v Rollova*, 124 AD2d 886, 889), and their exercise of that right does not bestow upon defendant an absolute entitlement to the charge. To warrant the charge, defendant always has the burden of making the required showing (*People v Brown*, 82 NY2d 869, 871). This he failed to do.

The court properly exercised its discretion in permitting the undercover officer to testify behind a screen. This was not a complete closure of the courtroom because the screen permitted spectators to hear the testimony, thus avoiding concerns about secret proceedings. At the same time, the screen was placed so that defendant and the jury could observe the witness's demeanor. The court's instructions prevented the jury from drawing any adverse inference from the presence of

the screen. Even if we were to apply the standards for complete closure, we would find that the proof adduced at the *Hinton* hearing, replete with evidence of organized-crime involvement and threatened and actual violence against informants and undercover officers, overwhelmingly supported full closure, including exclusion of defendant's relatives. We also find ample basis for permitting the officer to testify anonymously (*People v Kearse*, 215 AD2d 104, *lv denied* 86 NY2d 797).

We have considered and rejected defendant's remaining arguments, and find no abuse of discretion in sentencing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 23, 1999

/s/ CATHERINE O'HAGAN WOLFE
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 47

INDICTMENT NUMBER

427/94

608/94

THE PEOPLE OF THE STATE OF NEW YORK

—against—

THOMAS TOCCO,

Defendant.

RICHARD LEE PRICE, J.:

Defendant was charged with two counts of criminal sale of a controlled substance in the first degree for allegedly selling cocaine to an undercover officer. Prior to trial, the People moved to have the courtroom closed during the undercover officer's testimony and that he be permitted to testify without revealing his name. The People stated that the undercover officer expressed fear that if he was forced to identify himself and to testify in open court, he would be in grave danger from associates of the defendant, allegedly violent individuals with a propensity for retaliation. Further, his future ability to function as an undercover officer would be severely compromised.

A *Hinton* hearing was granted, and courtroom closure found to be warranted. Hence, a full length screen was erected behind the first row of the spectator section of the courtroom. This decision sets forth in greater detail the basis for that determination. At the *Hinton* hearing, Undercover #4126 testified this Court found his testimony credible in all respects.

Findings of Fact

Undercover #4126 has been a police officer for over 14 years, functioning for the past nine years as an undercover officer. As an undercover officer, he is assigned to long-term police investigations. His specific role is to infiltrate organized crime groups. When he receives an assignment, he is given intelligence information about members of a crime group suspected of being involved in criminal activities. It is his job to infiltrate the group and obtain additional intelligence of criminal activity. Currently, Undercover #4126 is an active member of the New York City Police Department and is still working in the same undercover capacity.

Undercover #4126 has testified approximately fifteen times in state court, approximately twelve with respect to cases in which he acted in an undercover capacity. In all twelve of those cases he testified in a closed courtroom.

The dangerous nature of his work is apparent. As such, Undercover #4126 takes a number of precautions to insure his safety. He changes his place of residence, takes different routes to and from work to prevent anyone from following him, does not follow the same daily schedule and does not sleep in the same location two nights in a row. He also makes sure that nobody is "clocking him," watching his every move.

In this particular case, Undercover #4126 used the name "Vinny." The duration of his investigation lasted from June 1993 until September 1993. His function was to go to Cafe D'Oro and Sebastian's Bar in the Throgs Neck section of the Bronx, to become a "regular" there, and to talk to and get to know people in the area. People at these two locations got to

know him as "Vinny" or "Vin." During the investigation, he fit into the neighborhood and developed a relationship at the bar and the cafe. Throughout the course of the investigation he had substantial contact with the defendant. Defendant stated on more than one occasion that there was a detective who fed him confidential police information. Undercover #4126 believes that defendant was referring to Detective John Wrynn.

Undercover #4126 testified that he purchased narcotics from the defendant during two hand-to-hand transactions during the month of July 1993. There were to be future transactions, but, all of a sudden, there was a separation of the narcotics relationship as defendant expressed an unwillingness to continue to deal with him. By September 1993, the operation was terminated.

On July 1, 1993, the date of the first alleged purchase, Undercover #4126 purchased 62 grams of cocaine from defendant. Defendant asked him if he was wearing a wire and they then patted one another down. Defendant then stated that his best friend had worn a wire and tried to bring an undercover to him. Undercover #4126 then asked the defendant if he was hot, ie., whether the FBI or other law enforcement agencies were watching him. Defendant answered that he was not, explaining that his friend on the force, a detective, told him that one of his friends was a confidential police informant wearing a wire. The defendant denied that there was an ongoing problem because, he said, referring to who he thought was the confidential informant, that "they wacked him." At a later time defendant told Undercover #4126 not to worry, "we made it look like an overdose."

At some point during the undercover operation, defendant's friend and co-defendant, Mario Ferranti, was talking to Undercover #4126 about another individual they suspected of being an undercover officer. Ferranti spoke to the suspected undercover and after that conversation, Undercover #4126 asked Ferranti if that person was an undercover cop. Ferranti replied that "if he was he would blow up his F'en house."

Associates of the defendant have been identified by the New York City Police Department as members of the Luchese and Genovese crime families. Defendant's cousin, Mr. Basciano, according to Police Department intelligence, is a "made man" in the Luchese family. Defendant's association with Basciano is further established because prior to 1993, Basciano owned three expensive cars all of which were registered in the defendant's name. A "made man," according to Undercover #4126, is someone who has been inducted into a specific organized crime family.

Additionally, defendant's father is known to associate with members of the Genovese and Luchese families. He is known as a "numbers guy," involved in book-making activities, according to police department intelligence. However, Undercover #4126 was unaware of any police record.

Sometime in 1994, FBI Agent Cindy Piel and other agents questioned Detective John Wrynn. He informed them that he had given "his friend a heads up in the neighborhood" meaning that there was an undercover in the community prior to Undercover #4126's involvement in this investigation.

Undercover #4126 testified that he knew that defendant was involved in the arson-homicide of Lieutenant Williams of the New York City Fire Department in 1992, which occurred within the confines of the 104th Precinct in Queens. On November 10, 1994, a female witness' car was firebombed in front of her residence, on the day she was supposed to testify before a federal grand jury. Defendant was incarcerated on an unrelated charge from January 11, 1994 to December 26, 1994 and could not have personally firebombed the car.

Sometime in February or early March of 1995 three arrests were made for the arson-homicide of Lieutenant Thomas Williams; defendant was one of the people arrested and he ultimately pleaded guilty in connection with those charges. About that time, defendant was also arrested for the narcotics sales. On the evening of March 7, 1995, soon after these arrests, Undercover #4126 received two telephone calls at his home. The first caller was a woman with a Spanish-sounding voice who asked to speak with Vinny or Vin. He said, "no,"

and she repeated the phone number. He then told her that there was "no one here by that name" and hung up. Approximately twenty minutes later, a male caller who sounded to him like a "knocked around guy," also asked for him using his undercover name. No direct threats were made during these calls. Undercover #4126 immediately called Agent Cindy Piel of the FBI to notify her of these calls. Pursuant to the FBI investigation they established that phone calls were made to Undercover #4126's house and established where they came from. However, they were unable to establish a connection to the instant investigation. Undercover #4126 had used the name "Vinny" in two prior investigations, but during those investigations he was living at a different address. He was living at the same address during this investigation in 1993 as he was when he got the phone calls in 1995.

Undercover #4126 was also informed by Detective Dowd that numerous phone calls were received at the 104th Precinct looking for him and asking for him by his real name and if he was an officer at that precinct. The FBI was also notified of these calls.

These telephone calls confirmed Undercover #4126's earlier suspicion that his identity as an undercover had been compromised. As a result of these phone calls, police officers were assigned to guard his house for one week to make sure that he was protected from harm. He believed that the calls originated from this investigation because this was the only investigation during which there was any suspicion that his identity as an undercover officer had been compromised.

Conclusions of Law

While fundamental, the right to a public trial guaranteed by the Sixth Amendment of the Constitution, is not absolute. Trial courts have the discretionary authority to restrict this right but must do so cautiously, when unusual circumstances necessitate it (*People v. Martinez*, 82 N.Y.2d 436, 441 (1993), *citing People v. Hinton*, 31 N.Y.2d 71, 76 (1972)). Courts

must carefully weigh the "[defendant's] individualized right to a public trial against the [witness'] expressed fears of retaliation . . . ." (*Martinez*, 82 N.Y.2d at 442, *quoting People v. Kin Kan*, 78 N.Y.2d, 54, 58 (1991)).

The United States Supreme Court has articulated a four prong test to determine whether a courtroom can be closed to the public: (1) there must be an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the courtroom, and (4) it must make findings adequate to support the closure (*Waller v. Georgia*, 467 U.S. 39, 48 (1984)). The New York State Court of Appeals has since adopted the same test (*see, Martinez*, 82 N.Y.2d at 442, *People v. Kin Kan*, 78 N.Y.2d 54 (1991)).

1. Overriding Interest

The first prong of the test requires the moving party to present "evidence of an overriding interest that is likely to be prejudiced" (*Waller*, 467 U.S. at 48).[1] Court's have repeatedly recognized that protecting the safety of an undercover officer is an overriding interest (*see, Martinez*, 82 N.Y.2d at 441, *Hinton*, 31 N.Y.2d 71 (holding that unusual circumstances justifying closure included the presence of other investigatory targets and gang members in the courtroom, and threats received by a witness)).

Courts have permitted closure in short term, "buy and bust" cases where the undercover officer reasonably feared for his/her safety because they either had current investigations

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[1] It is worthwhile to note that some courts have applied a less stringent standard of "substantial reason," rather than "overriding interest" in cases where the parties sought partial as opposed to complete closure. *See Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992), *United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995). In *Doe*, the court refused to apply the "substantial reason" standard used in *Woods*, because it found that the partial closure sought was far more extensive. The closure would have extended to "effectively the whole of the trial." *Doe*, 63 F.3d at 129.

pending or would continue to operate as an undercover in the same neighborhood where the defendant was arrested (*Martinez*, 82 N.Y.2d 436; *People v. Brown*, 653 N.Y.S.2d 544 (1st Dept 1997)).

Courts have also recognized that safety risks may require closure where a witness was engaged in long term operations into criminal enterprises. This is because "[t]he problem of retaliatory acts against those producing adverse testimony is especially acute in the context of criminal organizations . . . ." (*Doe*, 63 F.3d at 130)). Such circumstances include "cases involving criminal organizations in which a judge may reasonably infer the courtroom presence of interested parties with a motivation to retaliate against the witness . . . ." (*Ayala*, 89 F.3d at 96, *citing United States v. Scarpelli*, 713 F. Supp. 1144, 1145-46, n.2 (N.D.Ill. 1989) (the Court noted the possibility of "Godfather-style retribution)).

A trial court may reasonably *infer* a substantial probability from those facts put forth by the moving party. "[I]n some circumstances it might be within a [trial] court's discretion to grant closure without evidence of a direct threat or other evidence corroborating a [witness'] subjective fears . . . . (*Ayala*, 89 F.3d at 96).

This Court finds that the safety concerns of the undercover officer warrant some type of closure of the Courtroom during his testimony. The particular nature of this undercover's function makes him a prime target for violent retaliation. He spends months developing contacts and building relationships with members of criminal organizations convincing them that he is one of them. The people with whom he interacts on a daily basis are likely to retaliate against him if they found out that he is a police officer. Recognizing the importance of concealing his true identity, he takes extraordinary measures to make sure that he is not exposed. The co-defendant in this case told this very undercover officer that if he found out that a particular person was an undercover officer he would blow up his home. In addition, this defendant indicated that his best friend who acted as a police informant was murdered as a result, and the murder was made to look like a drug overdose.

Also, a witness in the arson-homicide case had her car firebombed on the day of her Grand Jury testimony. As such, acts of violent retaliation are a genuine concern in this case.

This Court has personally noted that a significant contingent of people who appear to be acquainted with the defendant have attended the proceedings from the first day this case was sent to this Part for pre-trial hearings. The undercover, who is highly experienced in the investigation of organized crime, also testified that the defendant's cousin is a "made man" in a major New York City organized crime family, and that the defendant's father is a bookmaker associated with members of organized crime. Although these assertions have not been independently corroborated, they have not been disputed either, and they raise suspicions that the defendant's criminal associations extend beyond his two co-defendants in the arson-homicide.

The suspicious phone calls received at defendant's home and the 104th Precinct and the police response to them establish the officer's vulnerability if his true identity is exposed. Even though the callers were not identified, it is highly likely that they stemmed from this operation. First, this was the only operation during which he used the name Vinny while living at that particular address. Second, the arson-homicide case against the defendant was being investigated by the 104th Precinct. Finally, an earlier investigation into the defendant had been compromised by a New York City detective.

Although Undercover #4126 is no longer operating within the Throgs Neck section of Bronx County, exposure of his identity at this time could obviously jeopardize future operations both in the Bronx and other counties. When he is called upon to infiltrate other organized crime groups Undercover #4126 may very well encounter someone who may be able to identify him from this trial. Unlike street narcotics dealers, members of organized criminal enterprises may operate diverse enterprises in numerous counties, and often in different states. In fact, this defendant committed an arson-homicide in Queens and faces charges stemming from two narcotics sales and an assault in the Bronx.

In *Ayala*, the Court rejected the State's assertion of likely prejudice because the State failed to establish a "nexus between [the undercover officer's] testimony and the ultimate compromise of [his] safety and cover." (89 F.3d at 95). It stated further that the undercover did not make reference to any specific fear resulting from testifying and sought courtroom closure as a matter of course. Likewise, the court in *Martinez* rejected the trial court's closure of the courtroom because it did not find a "link . . . between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case" (*Martinez*, 82 N.Y.2d at 443). Both courts purport to avoid sanctioning a rule of "per se closure for undercover officers, for the testimony establish[ing] no more than the officer's continuing activity as an undercover 'in the Bronx area' . . . and 'unparticularized impressions of the vicissitudes of undercover narcotics work in general.' " (*Id.*, quoting *People v. Jones*, 47 N.Y.2d 409 (1979), 415, *see also Ayala*, 89 F.3d at 96). The case at hand is easily distinguishable however, because the undercover has detailed numerous specific facts that justify his fear of testifying in an open courtroom in this particular case.

This Court also permitted the undercover officer to testify using only his shield number to further protect his identity (*see, People v. Kearse*, 215 A.D.2d 104 (1st Dept 1995); *People v. Scott*, 211 A.D.2d 589 (1st Dept 1995); *People v. Rengifo*, 150 A.D.2d 736 (2d Dept 1989)).

II. Narrowly Tailored

The second prong of the test requires the closure to be narrowly tailored to protect the undercover's safety (*Woods*, 971 F.2d at 76 (closure limited to exclusion of members of defendant's family and only for the duration of the witness testimony)). Even where closure is warranted, if the extent of the closure is broader than constitutionally tolerable, it will violate a defendant's right to a public trial (*Kin Kan*, 78 N.Y.2d at 60 (expulsion of everyone during testimony where witness feared defendant's friends but not his family)). This Court

carefully limited the closure in this case to the extent necessary to protect the undercover's identity. The closure was to be in effect only during the undercover officer's testimony. The defendant's wife and members of the press were permitted in the courtroom as long as they agreed not to describe the undercover officer's physical appearance or sketch him.

III. Reasonable Alternatives

Obviously, the hearing court must consider reasonable alternatives raised by defense counsel. But, the Supreme Court in *Waller* left open the question of whether the hearing court must consider alternatives *sua sponte*. The Court of Appeals has held that the trial court did not err in failing to consider alternatives (Martinez, 82 N.Y.2d at 444). By contrast, the Second Circuit in *Ayala* held that the failure of the trial court to *sua sponte* consider reasonable alternatives is reversible error (*Ayala*, 89 F.3d at 96). The *Ayala* decision was followed in *Pearson v. James*, No. 95-2801 (2d Cir. Jan. 30, 1997), but a two Judge concurring opinion severely criticized *Ayala*'s holding. The Appellate Division, First Department, has since followed the rule that "where there is a conflict between the decisional law of the Court of Appeals and that of an intermediate Federal appellate court, the ruling of the state Court of Appeals should be followed" (*People v. Brown*, 653 N.Y.S.2d 544 (1st Dept 1997), *citing People v. Joseph*, 85 AD2d 546; *People v. Lugo*, 650 N.Y.S.2d 102 (1st Dept 1996)). The Court of Appeals in *Martinez* did state that the better practice is for the hearing court to consider alternatives (*Martinez*, 82 N.Y.2d at 444). As such, this Court contemplated the possibility of the witness testifying behind a screen, and masking or disguising the witness' appearance (*see, Ayala*, 89 F.3d at 96, *Pearson v. James*, No. 95-2801 (2d Cir. Jan. 30, 1997)).

These options were raised by this Court during the hearing and defense counsel objected to disguising the witness. In any event, using a disguise would limit the jury's ability to assess the witness' demeanor (*see, Ayala*, 89 F.3d 91; *Pearson*, 105

F.3d 828). This Court then raised the possibility of erecting an opaque screen between the well and the spectator section. Defense counsel, while restating his general objection to closure, said that if his right to a public trial was to be restricted, the use of a screen would be his preferred method. The use of a screen may be disadvantageous to the defendant in that it may imply that defendant has dangerous associates, but so would the unexplained absence of the many courtroom spectators immediately prior to the undercover officer's testimony. The benefit of the screen is that it permits the defendant's family and other observers remain in the courtroom and listen to the undercover officer's testimony. In that way, the screen is less restrictive than a standard courtroom closure. Furthermore, the use of a screen has been approved as an alternative to closure (*see, United States v. Lucas*, 932 F.2d 1210, 12161217 (8th Cir. 1991)).

Accordingly, this Court ordered the erection of an opaque screen behind the first row of the spectator section which would permit defendant's wife and members of the press to sit in the front row. Since spectators sitting behind the screen would be able to hear the undercover officer's testimony, and the media and defendant's wife could watch him testify, the use of the screen was a less restrictive alternative to complete courtroom closure. The screen would achieve the overriding goal of protecting the safety of the undercover officer, not impair the jurors' ability to assess his demeanor, and would be no more prejudicial than necessary to protect the undercover officer.

This constitutes the decision, opinion and order of the Court.

Dated: July 1, 1997

/s/ RICHARD LEE PRICE, J.
J.S.C.